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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1982

CHICAGO BRIDGE & IRON COMPANY,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Appellee State of Washington, Department of Revenue, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that it is manifest that the questions presented are so unsubstantial as to need no further argument.

I.

STATEMENT

This appeal involves the validity of the Washington business and occupation tax (Wash. Rev. Code Ch. 82.04) as applied to certain business activities of the Appellant,

Chicago Bridge and Iron Co. ("CBI"), in the State of Washington. After describing these activities, we then describe Washington's business and occupation tax, as applied to these activities, and the nature of CBI's claim that this tax has been applied unconstitutionally.

A. CBI's Washington Activities.

CBI constructs and sells large steel structures throughout the world.[1] Illustrative of the types of steel structures built in Washington and involved in this dispute are the following: a nuclear containment vessel to house a nuclear reactor (Stip. Par. 197); a steel silo for the storage of aluminum 98 feet in diameter and 77 feet in height, (Stip. Par. 192, 193); and 42 oil storage tanks ranging in height from 40 to 51 feet and ranging in diameter from 60 to 200 feet (Stip. Par. 182, 183). The contracts between CBI and its customers cover the entire job from start to finish. Thus, the particular contracts involved in this litigation included the designing and engineering of the structure, the fabrication of the components — all of which took place outside of Washington — and its actual construction by CBI, which took place within Washington. CBI alleges that the value added by this in-state construction activity accounted for

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[1]In describing its Washington activities in its Jurisdictional Statement, CBI prefers the term "installation" to the term "construction." For example, the Question Presented refers to CBI's Washington activities under the contracts in dispute as involving "only installation." While the stipulation of facts does use this term, it does so in a rather Pickwickian sense, as the stipulation itself makes clear. As stated in Par. 8:

> "CBI has been engaged in the design, engineering, manufacture, and installation (including field painting and/or field testing when required by a contract) of large, all-welded steel-plate custom products, such as ground storage tanks, elevated tanks, spheres, silos, process tanks, nuclear containment vessels, hydro-electric generator components, and other items. CBI has used the term 'structures' for many types of its products. CBI has used the terms 'construction', 'installation', or 'erection' to describe the activities embodying the assembly and welding together of fabricated steel subassemblies into the whole product at a customer's installation site. The term 'installation' is used in this Stipulation in this sense."

30 to 40 percent of the total contract price in each case. J.S. 11.

B. Washington's Tax as Applied to CBI's Business

Washington's business and occupation tax is imposed "for the act or privilege of engaging in business activities." (Wash. Rev. Code § 82.04.220) The specific categories of the tax involved in this case are the retailing and wholesaling categories, which are imposed upon "every person * * * engaging within this state in the business of making sales" at either retail or wholesale. (Wash. Rev. Code § § 82.04.250 (retailing) and .270 (wholesaling); J.S. A-122) The tax is the same as that involved in *General Motors v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975).[2]

As seen from these two decision, the tax is a gross receipts tax, not a value-added tax or a net income tax. That is, it is measured by the total gross receipts received from Washington sales, without any deduction for any costs or expenses, even if those costs or expenses are incurred outside the State. In this respect, it is exactly like the Washington retail sales tax.

For purposes of the business and occupation tax as applied to contractors, the "sale" consists, in effect, of the sale of entire structure that the contractor is building. Under that tax, the actual construction of the structure is statutorily considered to constitute the sale itself. (Wash. Rev. Code § § 82.04.050 (J.S. A-116) and .060.)[3] And accordingly, the measure of the tax is the entire amount

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[2]For some contracts, CBI acted as a "prime" contractor, thus coming within the retailing category, and for others it acted as a "sub" to the "prime," thus coming within the wholesaling category. Which category is applicable in any particular case makes no difference whatsoever either analytically or practically.

[3]In its question presented, CBI erroneously assumes, and would have this Court assume, that "* * * all selling activity * * * occur[s] in other states * * *" This overlooks the fact that the most important and critical element of selling activity, i.e., the actual construction of the structure, takes place in Washington.

received by the contractor for the building and sale of the containment vessel, oil storage tank, or other type of structure.[4]

C. CBI's Principal Claim

CBI's principal claim is that the measure of the tax is too broad, and that the Commerce Clause requires an apportionment of the tax base which would convert Washington's gross receipts tax into a type of value-added tax. That is, only the 30 to 40% of the gross receipts attributable to value added in Washington may be included in the tax base. The rest, being attributable to value added outside Washington, must be excluded.

This claim, however, is made only with respect to 16 of CBI's 149 contracts for Washington jobs during the audit period. For the remaining 133, CBI concedes that 100% of the gross receipts may be included in the tax base. What distinguishes these 16 from the rest is that the rest were negotiated through the use of CBI's in-state offices and personnel, while the 16 were negotiated and entered into outside the State, without, it is contended, any participation by in-state offices or personnel. Stip. Par. 6, J.S. A-136, 137.

II

ARGUMENT

The Case Presents No Substantial Question and the Decision Below Is Clearly Correct.

A. CBI's Principal Claim Presents No Substantial Federal Question That Remains Unresolved By This Court's Decisions.

1. *General Motors and Standard Pressed Steel are Dispositive.*

CBI's claim that Washington's retailing and wholesaling business and occupation tax is not fairly

[4]For business and occupation tax purposes, the distinction between federal and non-federal contractors which was the subject of this Court's decision in *Washington v. United States*, ___ U.S. ___ (1983) does not exist. They are treated identically.

apportioned is directly contrary to two prior decisions of this Court involving the precise taxes at issue here.

Under *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), Washington's business and occupation tax may be measured by the total gross proceeds from interstate sales to Washington customers, so long as the in-state activities performed by the taxpayer's personnel "* * * were substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured.' " *Standard Pressed Steel*, 419 U.S. at 563, quoting from *General Motors*, 377 U.S. at 447.

In both *General Motors* and *Standard Pressed Steel*, items sold to the Washington customers were precisely the items which were manufactured outside the State and shipped from there, without alteration, to those Washington customers. In *General Motors*, they were entire automobiles; in *Standard Pressed Steel*, they were fasteners for making airplanes. In both, the in-state services consisted solely of sales or engineering services which, although certainly necessary to maintain the taxpayer's Washington market, did not in any way produce or alter the items being sold.

CBI apparently recognizes the applicability of *General Motors* and *Standard Pressed Steel* to 133 of its Washington contracts, though not to the remaining 16. Stip. Par. 6, J.S. A-136, 137. But these two decisions are dispositive of the 16 as well.

This is because of a simple but critical point, which CBI completely overlooks. CBI's in-state construction activities, in and of themselves, are certainly even more "substantial 'with relation to the establishment and maintenance of sales' " than were the in-state activities in *General Motors* and *Standard Pressed Steel*. After all, CBI's customers wanted, contracted for, and received completed structures, not just components. And it is CBI's in-state activities which produced those completed structures under all of the contracts, including the 16 in dispute here.

For this reason, the issue presented in this case is actually much easier than that presented in *General Motors* or *Standard Pressed Steel*.[5]

CBI could well rely on *General Motors* and *Standard Pressed Steel* if it entirely built its nuclear containment vessels or oil storage tanks outside the State, put them on a barge or railroad car, and then somehow dropped them into place for its customers. However, the structures CBI builds are simply too large for that. They can only be built in-state, on the site where their Washington customers want them permanently affixed. And this in-state building activity is the *sine qua-non* for making any sales at all to CBI's Washington customers.

In summary, in order for a state to include within the base or measure of a gross receipts tax the receipts from a sale of property, there must be more than just delivery to an in-state customer. There must be the additional element of nexus. That "nexus" may be the type of in-state selling and service activities involved in *General Motors* and the consulting and troubleshooting involved in *Standard Pressed Steel*. But in lieu of those activities, the nexus may be the actual in-state building, construction, or manufacture of the property which is sold. And that is what is involved here.

The curious nature of CBI's claim should now be apparent, especially in light of its position on the remainder of its Washington business. CBI paid without

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[5]If General Motors received orders for automobiles from Washington dealers and then assembled those automobiles in Washington, adding through this assembly process some 30 to 40 percent of the total value of the automobiles, and then delivered them to Washington dealers, surely Washington's business and occupation tax could be applied to those sales, and be measured by the total amount of those sales. This would be so even if General Motors did absolutely nothing else in the State with respect to these sales; *i.e.*, if all the contracts were executed outside the State and if all contacts involving these sales between General Motors personnel and the Washington dealers took place there as well.

If General Motors, under the circumstances given in this example, claimed that Washington could include only 30 to 40 percent of the gross proceeds from the sales of these automobiles in its tax base, such a claim would be rejected as frivolous. But that is, in essence, CBI's claim here.

protest retailing and wholesaling business and occupation tax, measured by the entire gross proceeds of the sale, on 133 contracts in Washington. As to these, CBI makes no claim that there should be further apportionment.

Nor does CBI dispute that for 13 of 16 contracts here involved,[6] the constitutionally required nexus exists, by reason of the in-state building or construction of the property being sold. J.S. 35. CBI's contention, rather is that the amount of the nexus provided by this in-state building activities must somehow be quantified, and must then be used to determine the portion of the gross receipts that may be utilized in the tax base. But when in-state sales or service activities of the sort involved in *General Motors* and *Standard Pressed Steel* provide the nexus, then this quantitative relationship between nexus and the tax base is no longer constitutionally required.

We fail to see any rationale at all for this proposed distinction. And CBI provides none.

2. *Exxon and Mobil In No Way Undercut The Applicability of General Motors and Standard Pressed Steel.*

CBI relies heavily upon *Exxon Corp. v. Department of Revenue*, 447 U.S. 207 (1980) and *Mobil Oil Corp. v. Commissioner*, 445 U.S. 425 (1980). These were net income tax cases, involving two related issues. In *Mobil*, the issue was whether dividends received by a parent from subsidiaries which, with the parent, constituted a unitary business, could be included in apportionable tax base of the parent. The Court held the dividends could be so included. In *Exxon*, the issue was whether a state could include in the apportionable tax base the total net income of a unitary business, including net income derived from out-of-state production when the state of production itself imposed a severance tax on that production. Again, the Court held that the total income could be included in the apportionable tax base.

Neither case even remotely suggests that the holding and rationale of *General Motors* and *Standard Pressed*

[6]The existence of nexus for the three so-called Kamyr contracts is in dispute. See p. 12, infra.

Steel are to be overturned, or that Washington business and occupation tax must be turned into a value-added tax.

Mobil and *Exxon* are inapposite for an even more fundamental reason. Gross receipts taxes, such as the tax involved here, are more akin to a general retail sales tax than a net income tax. Indeed, the general retail sales tax is a species of a gross receipts tax. Quite logically, then, the criteria applied by this Court in such gross receipts tax cases as *International Harvester v. Indiana Department of Treasury*, 322 U.S. 340 (1944), *General Motors*, and *Standard Pressed Steel* have paralleled the criteria applied in sales tax cases. Indeed, in the first of these cases, *International Harvester*, Justice Douglas, speaking for the majority, explicitly stated that the criteria should be identical. See 322 U.S. at 348, 349.[7] That approach has been followed ever since.

CBI is here asking for a complete shift away from this approach, which has been utilized by this Court for at least 39 years. Certainly *Mobil* and *Exxon* provide no basis for making such a shift. And if it is to be made at this late date, we would suggest that the Congress, rather than this Court, is now the appropriate body to make it.

B. CBI's Claim of Multiple Taxation also Presents no Substantial Federal Question that Remains Unresolved by this Court's Decisions.

CBI claims that Washington's tax subjects it to the risk of multiple taxation. J.S. 20-26. No claim is made, however, that CBI is subject to any *actual* multiple taxation. Indeed, there is nothing in the record to support

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[7]As there stated:

"We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (McGoldrick v. Berwind White Coal Min. Co., supra) are as adequate to support this tax as they would be to support a sales tax." 322 U.S. at 349. That should be the holding here as well.

such a claim, even if it were made.[8] Thus, CBI is in precisely the same position as were the taxpayers in *General Motors* and *Standard Pressed Steel.* And just as in those cases, the absence of any existing duplicative or multiple taxation not only alters the nature of CBI's claim, but is fully dispositive of that claim.

As this Court stated in General Motors:

> "A more difficult question might arise from appellant's claim of multiple taxation. Gwin, White & Prince, Inc. v Henneford, 305 US 434, 440 (1939). General Motors claims that some of its products taxed by Washington are manufactured in St. Louis where a license tax, measured by sales before shipment, is levied. See American Mfg. Co. v St. Louis, 250 US 459 (1919). It is also urged that General Motors' Oregon-based activity which concerns Washington sales might afford sufficient incidents for a similar tax by Oregon. The Court touched upon the problem of multiple taxation in Northwest Airlines v Minnesota, supra, 322 US at 295, but laid it to one side as 'not now before us.' Thereafter, in Northwestern States Portland Cement Co. v Minnesota, supra, 358 US at 463, we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. cf. International Harvester Co. v

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[8]CBI paid income tax in other states and CBI attempted to calculate, through separate accounting, how much income tax was attributable to each contract. Stip. Par. 162-168. The payment of income tax does not constitute a multiple burden when compared with a severance tax on the value or quantity of minerals produced (See *Exxon,* 477 U.S. at 229 f.n. 12) or a gross receipts tax on the activity of making retail or wholesale sales. Even if this were a multiple tax situation it is de minimis. Washington's tax on the contracts at issue was $102,936.85. Stip. Attachment B. CBI calculates that it paid $12,025.26 in income tax to other states on these contracts. Stip. Par. 168. This is an alleged tax overlap of only 11.68%. This is much smaller than the 34.38 to 37.01% overlap alleged in *Moorman Manufacturing Co. v. Blair,* 437 U.S. 267 at 276 (1978), f.n. 10. The Court has consistently refused to read into the Constitution a requirement for mathematical precision in apportionment. 437 U.S. at 278, 279.

> Evatt, 329 US 416, 421-424, (1947). And further, is has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation,' e.g., Northwestern States Portland Cement Co. v Minnesota, supra, and we adhere to that position." 377 U.S. 448, 449.

Similarly, in *Standard Pressed Steel* the Court relied upon this language in *General Motors*, in disposing of the same claim of multiple taxation:

> "We noted in General Motors that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it. Id., at 449. The corporation made no such showing there. Nor is any effect made to establish it here." 419 U.S. at 593.

CBI is reduced to making the same theoretical argument as was made in *General Motors* and *Standard Pressed Steel*, i.e., that if other states had Washington's tax system, CBI would be subject to a multiple burden. Even this argument, however, is incorrect. Washington's business and occupation tax, as applied to retailing and wholesaling activities, is imposed only with respect to sales consummated by delivered in Washington. As the state of delivery, Washington is the only state which can impose a gross receipts tax on the business of making those sales. See *Evco v. Jones*, 409 U.S. 91 (1972), striking down a gross receipts tax imposed by the state of origin with respect to interstate sales.

The point made by this Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) regarding Montana's severance tax on coal is applicable here as well.

> "Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance tax can occur in no other state' and 'no other state can tax the severance.'" 453 U.S. at 617.

So too here, no other state can tax what Washington is taxing. See also *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 at 260 (1938).

C. CBI's Claim of Discriminatory Taxation Presents no Substantial Federal Question That Remains Unresolved by this Court's Decisions.

CBI makes a secondary claim that Washington's tax discriminates against interstate commerce. J.S. 27, 28. In addition to the business and occupation tax on retailing and wholesaling activities (Wash. Rev. Code §§ 82.04.250, .270), a tax is also imposed on manufacturing activities. (Wash. Rev. Code § 82.04.240) If a taxpayer manufactures in Washington and subsequently sells the product so manufactured in this State, only the wholesaling or retailing tax is applicable, not the manufacturing tax. (Wash. Rev. Code § 82.04.440, J.S. A-124) CBI claims that this exemption from the manufacturing tax discriminates against interstate commerce.

This precise claim was raised by the taxpayer in *General Motors*. See 377 U.S. at 459, 460 (Goldberg, J., dissenting). The majority in *General Motors* was not sufficiently troubled by the question to even discuss it.

This was for good reason, as the Court's subsequent decisions show. A tax discriminates when it provides, in the form of a lower tax bill, a direct advantage to a local business not enjoyed by an interstate business. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) and *Maryland v. Louisiana*, 451 U.S. 725 (1981). Washington's tax provides no such advantage to the local business, and is completely neutral as between interstate and intrastate commerce.[9]

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[9]The vice of the tax systems invalidated in *Maryland v. Louisiana* and *Boston Stock Exchange* is succinctly described in a provision of HR 6402, 97th Cong., 2d Sess. (1982), *i.e.*, § 622, entitled "Prohibition Against Geographical Discrimination:"

> "No provision of State law shall make any person liable for a greater amount of sales or use tax with respect to tangible personal property, or gross receipts tax with respect to tangible personal property, *by virtue of the location of any occurrence in a State outside the taxing State, than the amount of tax for which such person would otherwise be liable if such occurrence were within the State* * * *"(Emphasis supplied)

Washington's tax, of course, would not in any way violate such a provision.

To be more specific, precisely the same tax, in precisely the same amount, is imposed upon contractors such as CBI, regardless of whether the components or materials they use in their construction projects come from within the state or outside the state. Thus, the Washington tax is indistinguishable in this respect from that upheld in *Montana*, which the Court described as follows:[10]

> "But the Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this evenhanded formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases. See, e.g., Maryland v Louisiana, 451 US 725, (1981); Boston Stock Exchange v State Tax Comm'n, 429 US 318 (1977); * * *" 453 U.S. at 618.

D. The Three Kamyr Contracts Present No Substantial Federal Question.

CBI raises one additional issue with regard to three of its contracts. J.S. 36-39. The issue presented by the so-called Kamyr contracts is narrow, and involves only a

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[10]Washington tax in this respect is also similar to the tax in *Boston Stock Exchange v. State Tax Commission*, as it existed *prior* to the 1968 amendment which this Court ruled unconstitutional. The original tax was imposed on sales, agreements to sell, memorandum of sales, delivery of stock and transfer of stock. The tax applied if any of these five events took place in New York. However, if more than one event took place, only one tax was paid on the entire transaction. 429 U.S. at 321, 322. This is similar to Washington manufacturing and retailing taxes. If both activities occur in Washington only one tax is paid. The Court indicated in *Boston Stock Exchange* that such a system did not discriminate against interstate commerce. In the words of the Court:

> "Prior to the 1968 amendment, the New York transfer tax was neutral as to in-state and out-of-state sales. An in-state transfer or delivery of securities triggered the tax and the burden fell equally on all transactions regardless of the situs of sale. Thus, the choice of an exchange for the sale of securities in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax." 429 U.S. at 330.

question of nexus, not apportionment or multiple taxation. The nexus issue arises from the fact that the three Kamyr transactions differ from the others in one respect. Though each was the product of a single negotiation, which resulted in a single price for each total job, each transaction was bifurcated into two separate contracts, one covering design, fabrication, and sale of the components ("component contract"), the other covering the erection or construction ("erection contract") Stip. Par. 170.

CBI concedes the existence of nexus for the erection contracts, which accounted for at least 40 percent of the total price negotiated for the total job, and concedes that this portion of the total price is properly includable in the tax base. It contests, however, inclusion of any of the remainder, which is accounted for by the component contracts.[11]

This contention is without merit. The question is not whether nexus exists to tax CBI, but whether the Kamyr contracts may be disassociated from CBI's local business. The Court's decision in *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951) is controlling. There the taxpayer made a similar claim with respect to certain of its sales into Illinois. The Court stated:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only showing that particular transactions are dissociated from the local business and interstate in nature." 340 U.S. at 537.

CBI has clearly submitted itself to Washington's taxing jurisdiction. Thus, the only issue is whether CBI has sustained its burden of disassociating the Kamyr contracts from its Washington business. Perhaps CBI could meet this burden if it simply delivered a completed

[11]The Kamyr contracts were bifurcated at the request of CBI's customer, which was itself bifurcated into Kamyr, Inc., the other party to the components contracts, and its sister corporation, Kamyr Installations, Inc., the other party to the erection contracts. These two corporations were contractors with a single customer, Weyerhaeuser Co., and CBI acted as a subcontractor. J.S. A-86, 87.

product to its customer in Washington, off of a railroad car or barge. This, however, is not what CBI did or what its contracts required it to do.

The record makes it clear that without the erection contracts and the in-state activity of CBI which took place thereunder, the sales of the components would never have taken place at all. From beginning to end, the sale of the components and the erection activities were part of a single, integrated transaction for which a single, lump sum price was negotiated, just as in the case of all the other contracts.[12]

Thus, the local construction or erection activity was absolutely essential to CBI's sales under the Kamyr contracts. Since these sales cannot be disassociated from CBI's local business activity, they are properly subject to Washington's tax.

E. There is No Confusion Among the States Regarding the Issues Involved Here; and Congressional Inaction Shows That the Questions Raised by CBI Are Not Substantial.

CBI urges the Court accept jurisdiction because there is some confusion among the states on the question of the constitutional necessity of apportionment of gross receipt taxes. J.S. 28-32. In fact, no such confusion exists. Indeed, especially after *General Motors* and *Standard Pressed Steel*, the applicable principles are quite clear. Simply stated, the destination state may apply a gross receipts tax, measured by the total proceeds of sales within its borders, if there is the constitutionally required nexus. Conversely, without that nexus, none of those proceeds

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[12]As stated in paragraph 47 of the Stipulation:

"* * * CBI had the policy of negotiating all jobs in terms of a lump-sum price for all aspects of the work. Normally, CBI did not contract for any single aspect (that is, design, engineering, procurement of materials, manufacturing, installation or delivery) without contracting for all aspects of a job."

The three Kamyr transactions were not exceptions to this policy.

may be utilized in the tax base.[13] Here, of course, the existence of the constitutionally required nexus is simply not an issue—with the exception of the three Kamyr contracts.

Nor has the Congress seen fit to reverse or modify these principles. Indeed, it has seldom even contemplated such action. As the Court has observed in another context: "Non-action by Congress is not often a useful guide, but the non-action here is significant." *Bob Jones University v. United States*, ___ U.S. ___ (1983) (Slip. Op. 25). Since the issuance of what is commonly called the Willis Report, (Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964)), numerous bills have been introduced to regulate state taxation of interstate businesses. See, e.g., H.R. 11798, 89th Cong., 1st Sess. (1965); H.R. 16491, 89th Cong., 2d Sess. (1966); S. 317, 92d Cong., 1st Sess. (1971); S. 1245, 93d Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975); H.R. 9, 94th Cong., 1st Sess. (1975); S. 983, 96th Cong., 1st Sess. (1979); H.R. 6402, 97th Cong., 2d Sess. (1982). With the exception of the first, which would have allowed only the origin state to impose a gross receipts tax on sales of property, every one of these bills, if enacted, would have allowed Washington's business and occupation tax to be applied in the manner which we here urge and which the courts below upheld, and would continue the pattern, established by this Court, of treating gross receipts taxes in a manner similar to that utilized for

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[13] As this Court recognized in *Standard Pressed Steel*, the application of these principles results in a type of apportionment.

> "In the instant case, as in *Ficklen v. Shelby County Taxing District*, 145 U.S. 1 (1892), the tax is on the gross receipts from sales made to a local consumer, which may have some impact on commerce. Yet as we said in *Gwin, White & Prince*, supra, at 440, in describing the tax in *Ficklen*, it is 'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564.

"Allocated" might be, we would agree, a better descriptive term than "apportioned". But whatever term one uses, no additional apportionment of the sort proposed by CBI has ever been required by this Court. Nor, as we shall see, has Congress ever contemplated such an additional apportionment.

retail sales taxes. This shows that the issues raised by CBI are of little national importance, and can hardly be considered as substantial.[14]

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

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[14]The last of the series, H.R. 6402, is typical. Although it distinguishes between sales taxes and gross receipts taxes in terms of whether the tax is separately stated from the sales price or not (§§ 603, 605), it establishes a uniform jurisdictional standard applicable to both. (§101) Moreover, under this standard, which is cast in terms of a business location (cf. §611), if the standard is met by the taxpayer, *all* of that taxpayer's sales apparently go into the sales or gross receipts tax base, even though the business location may have had nothing to do with those sales. (See §101 last sentence; but cf. §623(3)). In this manner, H.R. 6402 may actually expand taxing jurisdiction.